IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12217 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MOHAMMED IDRISH @ DATTU AIYUBBHAI SHAIKH

Versus

STATE OF GUJARAT

Appearance:

MR MM TIRMIZI for the Petitioner.

Mr.V.M. Pancholi, Assistant GOVERNMENT PLEADER, for Respondent No. 1-3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 04/03/2003

ORAL JUDGEMENT

The petitioner-detenu has challenged the detention order dated 26.7.2002, by which he is detained as a 'bootlegger', under the provisions of the Gujarat Prevention of Anti-Social Activities Act, 1985 ("PASA",

for short). Along with the detention order, he is served with the grounds of detention. In the grounds of detention, there is a reference of one pending criminal case against the petitioner under the Bombay Prohibition Act. On the basis of the solitary criminal case and on the basis of the statements of some witnesses, which were recorded later on, the petitioner is detained as a 'Bootlegger' under PASA. In the detention order, the detaining authority has also mentioned the fact that the petitioner is already in judicial custody. However, it is stated that he may be released on bail at any time and thereafter, he may continue with the said activity again and on that ground, he is detained under the provisions of PASA, even though, at the relevant time, he was in judicial custody.

The learned Advocate for the petitioner relied on the decision of the Apex Court in Amritlal & Others v. Union Government and others, AIR 2000 SC 3675, wherein this Court has held as under :-

> " ... ...
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> 4. In Agustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : (AIR 1986 SC 2090 : 1986 Cri LJ 1959) wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below:-
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> "Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against

> Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."
>
> xxx xxx xxx
>
> 6. The requirement as noticed above in Binod Singh's case (AIR 1986 SC 2090 : 1986 Cri LJ 1959) (supra) that there is 'likelihood of the petitioners being released on bail' that however is not available in the reasonings as provided by the concerned officer. The reasoning available is the 'likelihood of his moving an application for bail' which is different from 'likelihood to be released on bail.' This reasoning, in our view, is not sufficient compliance with the requirements as laid down.
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> 7. The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.
> ... ..."

It is, therefore, submitted by the learned Advocate that the Authority has not properly applied its mind as to why it is necessary to detain the detenu under preventive detention even if he is in judicial custody. Except mentioning that he may be released, at any time, on bail, nothing further is stated as to on what basis the Authority has reached the aforesaid satisfaction.

Considering the judgment of the Apex Court, referred to above, as the authority has not properly considered as to on what basis the petitioner may be released on bail at any time, even though he is in judicial custody, the detention order is required to be set aside.

This petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the detenu be released forthwith unless he is required in connection with any other case. Rule is made absolute.

4th March, 2003 (P.B. Majmudar, J.)

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(apj)